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No. 94-1905

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOAQUIN OSVALDO GALLO-CHAMORRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court exceeded the terms of petitioner's extradition, which prohibited petitioner's trial as an aider and abettor under 18 U.S.C. 2, when it instructed the jury that if it found petitioner was a member of a conspiracy, it could convict petitioner for the reasonably foreseeable substantive offenses of his co-conspirators.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 48 F.3d 502.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1995. The petition for a writ of certiorari was filed on May 19, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on three counts of distribution of

cocaine, in violation of 21 U.S.C. 841(a)(1), and one count of importation of cocaine, in violation of 21 U.S.C. 960. He was sentenced to 30 years' imprisonment, to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. 1-16.

1. The evidence at trial showed that in 1987 and 1988, petitioner, a Colombian national, orchestrated the importation of several 400- to 500-kilogram loads of cocaine from Colombia into the United States. Petitioner distributed the cocaine from a residence located in Palm Beach County, Florida. In April 1988, petitioner coordinated the importation of 500 kilograms of cocaine into the United States. Law enforcement authorities intercepted that load and arrested petitioner's co-conspirators. Petitioner subsequently became a fugitive and returned to Colombia. Gov't C.A. Br. 7-13.

2. On January 9, 1990, petitioner was arrested in Bogotá, Colombia. On January 11, the United States requested petitioner's provisional arrest. Two months later, the United States submitted Diplomatic Note 206 to the Republic of Colombia, requesting that petitioner be extradited to the United States to stand trial for several narcotics trafficking crimes, including violations of the aiding-and-abetting statute, 18 U.S.C. 2. Pet. App. 2.

On September 5, 1990, the Colombian government extradited petitioner to the United States for trial on one count of importation of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1), one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and three counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 3, 28-29. The extradition document denied extradition on all other counts. It specifically provided that "[t]he [Colom-

bian] Supreme Court of Justice has stated, on several occasions, that the violation of Title 18, Section 2, of the United States Code does not have an equivalent in Colombia, so therefore the extradition shall not be authorized, either, on account of this definition." *Id.* at 25.

3. Before his trial commenced, petitioner filed a Motion to Enforce Rule of Specialty, arguing that he could not be prosecuted for any offense under 18 U.S.C. 2. The district court granted petitioner's motion and, accordingly, the court redacted all mention of Section 2 from the indictment submitted to the jury and omitted the standard aiding-and-abetting instruction when it charged the jury. Pet. App. 4-5.

Over petitioner's objection, however, the district court gave the jury a *Pinkerton* instruction on the count charging importation of cocaine. See *Pinkerton* v. *United States*, 328 U.S. 640 (1946). That instruction told the jury that "[a] Defendant found guilty of a conspiracy offense may be found guilty of a substantive count even though he, the Defendant, did not participate in the importation of cocaine." Pet. App. 6 n.5. Under the instruction, the jury was required to convict if it made the following findings beyond a reasonable doubt:

> (1) a conspiracy existed; (2) [petitioner] was one of the Conspirators; (3) the act of importing cocaine into the United States was reasonably foreseeable and was done by any one or more co-conspirators other than [petitioner] during the pendency of and in furtherance of such conspiracy.

Id. at 7 n.5.

Petitioner objected to the *Pinkerton* instruction on the ground that it violated the terms of his extradition. He argued that Colombia had extradited him

only to be tried as a principal, not as an aider and abettor, and that *Pinkerton* provides for a constructive theory of liability to which Colombia would have objected. The district court overruled that objection, finding that "[a]iding and abetting is not the same as conspiracy, and *Pinkerton* is based on conspiracy." Pet. App. 6.

During deliberations, the jury inquired whether the *Pinkerton* instruction applied to the importation count or to all counts. Over petitioner's objection, the district court instructed the jury that the *Pinkerton* instruction applied to the three counts charging petitioner with distribution of cocaine, as well as the importation count. Pet. App. 6-7. The jury acquitted petitioner on the conspiracy count, but convicted him on the importation count and the three distribution counts. *Id.* at 7.

At sentencing, petitioner advised the district court that the Colombian government had sent a diplomatic note to the United States formally protesting the *Pinkerton* instruction given to petitioner's jury. The district court declined to take action on petitioner's objection. Pet. App. 8.

Seven days after sentencing, petitioner filed with the district court Diplomatic Note E-1518 in which the Colombian government informed the United States Department of State that "[t]he Pinkerton theory, which is wholly vicarious in nature, is not recognized by Colombia since, like 18 U.S.C. Section 2, it has no comparable legal concept in the Colombian Criminal Code." Pet. App. 37. Diplomatic Note E-1518 protested that "[b]y instructing the jury that it could find [petitioner] guilty of the substantive crimes charged under a theory of vicarious criminal liability, not recognized by Colombia, the trial judge

violated the extradition Resolution, and other principles of international law." *Id.* at 38.

4. The court of appeals affirmed. Pet. App. 1-16. It rejected petitioner's contention that the *Pinkerton* instruction allowed him to be prosecuted on a crime for which he had not been extradited and thus violated the doctrine of specialty. Relying on this Court's decision in *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949), the court concluded that "criminal liability for aiding and abetting under 18 U.S.C. § 2 is not the same as co-conspirator liability under *Pinkerton*." Pet. App. 12. Accordingly, the court held that the extradition decree's prohibition on petitioner's prosecution under Section 2 did not bar the submission of the substantive counts of the indictment to the jury on a *Pinkerton* theory.

The court of appeals also held that Diplomatic Note E-1518, in which the Colombian government protested the use of the *Pinkerton* instruction at petitioner's trial, had "no persuasive or precedential value in this case." Pet. App. 16. The court explained that, "[a]lthough extradition agreements and the specialty doctrine undeniably control the United States courts' jurisdiction over foreign defendants such as [petitioner], these international principles of law cannot be 'construed to permit foreign intrusion into the evidentiary or procedural rules of the requisitioning state.'" *Ibid.* (quoting *United States* v. *Archbold-Newball*, 554 F.2d 665, 685 (5th Cir.), cert. denied, 434 U.S. 1000 (1977)).[1]

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[1] The court of appeals declined to consider petitioner's contention that the doctrine of dual criminality barred his prosecution because petitioner had not raised that claim in the district court. Pet. App. 14-15.

ARGUMENT

Petitioner renews his contention (Pet. 12-21) that the district court's *Pinkerton* instruction violated the terms of his extradition from Colombia and that the rule of specialty therefore requires reversal of his convictions. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

The rule of specialty provides that an extradited person is subject to prosecution in the requesting country only for those offenses for which he was extradited. See *United States* v. *Rauscher*, 119 U.S. 407, 419 (1886); *United States* v. *Herbage*, 850 F.2d 1463, 1465 (11th Cir. 1988), cert. denied, 489 U.S. 1027 (1989); *Shapiro* v. *Ferrandina*, 478 F.2d 894, 905 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973); 1 Restatement (Third) of Foreign Relations Law of the United States § 477, at 578 (1987).[2] In this case, the district court adhered strictly to the rule. Colombia extradited petitioner for trial on five specified charges: one

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[2] Petitioner was not extradited pursuant to the treaty between Colombia and the United States, because the Colombian Supreme Court has held unconstitutional the Colombian law implementing the treaty. Instead, petitioner was extradited under Decree Number 1860, which was issued by the President of Colombia in 1989. Pet. App. 3 n.1. In the absence of an applicable treaty provision, the decision whether to return petitioner to Colombia because of a violation of Colombian or international law "is a matter for the Executive Branch." *United States* v. *Alvarez-Machain*, 504 U.S. 655, 669 (1992). Thus, although the Republic of Colombia is entitled to assert a violation of the rule of specialty, it is not clear that, in the absence of an applicable treaty, petitioner has standing to raise a violation of the rule. See *id.* at 667.

count of importation of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1), one count of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and three counts of distribution of cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner was tried only on those charges. Moreover, the district court complied with the provision of the extradition order forbidding petitioner's trial for aiding and abetting under 18 U.S.C. 2. In accordance with that provision, the court redacted all mention of Section 2 from the indictment and declined the government's request to instruct the jury on aiding and abetting.

Contrary to petitioner's contention, the district court's *Pinkerton* instruction did not exceed the terms of his extradition. The extradition decree does not forbid the use of a *Pinkerton* instruction, and the *Pinkerton* instruction did not add any counts to the indictment or permit petitioner's conviction on any offense for which he was not extradited. The instruction merely explained to the jury that petitioner could be found guilty on the substantive counts for which he was extradited if the jury found that he participated in the conspiracy offense for which he was also extradited and that the substantive offenses were reasonably foreseeable acts of his co-conspirators. The decision below accords with the decision of the only other court of appeals that has considered a similar issue. See *United States* v. *Thirion*, 813 F.2d 146, 152-153 (8th Cir. 1987) (rejecting claim that giving of *Pinkerton* instruction violated rule of specialty when extraditing country barred the defendant's trial on conspiracy charge).

Nor is there merit to petitioner's implicit contention (see Pet. 18) that the extradition decree's prohibition on trying petitioner for aiding and

abetting under 18 U.S.C. 2 precluded the submission to the jury of the counts on which he had been extradited on a *Pinkerton* theory. As the court of appeals concluded, liability for the reasonably foreseeable acts of a co-conspirator under *Pinkerton* is not the same as liability as an aider and abettor under Section 2. As this Court has explained,

> [t]he rule of [*Pinkerton*] does service where the conspiracy was one to commit offenses of the character described in the substantive counts. Aiding and abetting has a broader application. It makes a defendant a principal when he consciously shares in any criminal act whether or not there is a conspiracy. * * * *Pinkerton* v. *United States* is narrow in its scope. Aiding and abetting rests on a broader base; it states a rule of criminal responsibility for acts which one assists another in performing.

Nye & Nissen, 336 U.S. at 620. In light of that analysis, Columbia's refusal to extradite petitioner for any offense under Section 2 did not preclude the district court from giving the jury a *Pinkerton* instruction.[3]

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[3] To the extent petitioner can be understood to argue (see Pet. 12-17) that the *Pinkerton* doctrine is unconstitutional for lack of a statutory basis, that contention does not merit this Court's review. The *Pinkerton* doctrine is a well-established feature of criminal law (see, *e.g.*, *United States* v. *Vario*, 943 F.2d 236, 240 (2d Cir. 1991) (*Pinkerton* liability is a "fundamental tenet of the law of conspiracy"), cert. denied, 502 U.S. 1036 (1992)) that does not warrant this Court's reexamination. In any event, petitioner failed to object to the *Pinkerton* instruction at trial on the ground of its unconstitutionality, and the district court's use of the instruction was not plain error. See *United States* v. *Olano*, 113 S. Ct. 1770 (1993).

Finally, petitioner suggests (Pet. 19-20) that the district court should have granted him relief after the Republic of Colombia sent Diplomatic Note E-1518, which protested the use of a *Pinkerton* instruction at petitioner's trial. In the absence of any restriction in an extradition treaty or the extradition decree itself, however, the law of the United States governs the application of the rule of specialty in this country's courts. See *United States* v. *Abello-Silva*, 948 F.2d 1168, 1174 (10th Cir. 1991), cert. denied, 113 S. Ct. 107 (1992). Thus, as the court of appeals concluded, Colombia's Diplomatic Note E-1518 has no bearing on the question whether the *Pinkerton* instruction violated the rule of specialty. Instead, it raises only a question of international relations within the province of the Executive Branch.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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